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A Critic's View of the Warren Court - Nine Men in Black Who Think White (The New York Times)

Lewis M. Steel '63

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Nine Men in Black Who Think White

By LEWIS M. STEEL

THE United States Supreme Court has begun a new term embroiled in a controversy, involving the President, Congress and the Court itself, over the appointment of a new Chief Justice. The battle has been portrayed as a contest between liberals and conservatives, civil rights supporters and racists.

Whatever the validity of these characterizations, the rhetoric employed by the Court's rightist critics has followed a time-worn script, evoking from the egalitarians similarly stale defenses. A hard analysis of the Court's race-relations record, however, discloses that the defenders have been pushed into supporting an institution which has not departed from the American tradition of treating Negroes as second-class citizens.

Historically, the Supreme Court has been the enemy of the American black man. During the 15 years in which Earl Warren has presided as Chief Justice, the Court has eliminated from the law books some of its more atrocious decisions. But never has it indicated that it is committed to a society based upon principles of absolute equality.

Popular belief has it that the Court deserves the major credit for awakening the nation to its civil rights responsibilities in 1954, when the justices decided that enforced segregation in our public schools violated constitutional precepts. With resolute firmness, according to both detractors and supporters, the Court has continued to strike down segregation and discrimination on every occasion. And, according to the traditional viewpoint, both the executive and legislative branches of our Government have lagged behind the Warren Court.

BECAUSE I believe, along with the National Advisory Commission on Civil Disorders, that "our nation is moving toward two societies, one black, one white—separate and unequal," I feel that all our institutions must be re-examined. A re-evaluation of the role of the United States Supreme Court discloses that it has struck down only the symbols of racism while condoning or overlooking the ingrained practices which have meant the survival of white supremacy in the United States, North and South. The Court has time and again taken the position that racial equality should be subordinated—or at least balanced against—white America's fear of rapid change, which would threaten its time-honored prerogatives. Only where racial barriers were overtly obnoxious—and, therefore, openly contradictory to the American creed of equality—has the Court deigned to move. Yet its decisions have allowed a confused, miseducated and prejudiced white public to believe that its black fellow citizens have been given their full rights.

Though the liberals have been applauding it, the Court under Chief Justice Warren has "never committed itself to a society based upon principles of absolute equality."

To understand the Supreme Court's role in the civil rights movement and its peculiar obligation to insure equality for Negroes, it is imperative to understand the Court's role in establishing segregation in America. In the post-Civil War years, the Supreme Court led the nation away from the Reconstruction Congress's program for full citizenship for the freedmen. Congress passed five civil rights acts between 1866 and 1875. The 1875 act contained some strong public-accommodations sections that forbade racial discrimination in inns, public conveyances, theaters and other places of public amusement. When the act was first tested in the Supreme Court eight years later, the public-accommodations sections were struck down as unconstitutional; the opinion completely ignored the intent of Congress in passing the act and in proposing to the states the 13th and 14th Amendments. The Supreme Court thus opened the door for the passage of Jim Crow legislation.

Then, in 1896, the Court endorsed the establishment of a quasi-slave caste system by ruling that the states could require the segregation of public facilities as long as Negroes were provided equal accommodations. Three years later, the Court allowed Georgia to support a white high school while failing to provide secondary education for Negro children. This action destroyed even the myth of equality. Finally, in 1906, the High Court ruled that Congress had no constitutional authority to pass laws which would protect Negroes from harassment by whites solely on racial grounds.

Taken together, these cases meant that, in the Supreme Court's view, Congress could not protect Negroes from attack by their former masters and that state legislatures could pass laws which compelled a caste system.

UNTIL 1954, the Supreme Court left its handiwork virtually alone. True, in the grandfather-clause and white-supremacy cases it disapproved of obvious measures to disfranchise Negroes completely, and in 1947 it prohibited the judicial enforcement of racially restrictive covenants attached to land deeds. But these decisions had no effect on the totally segregated society. Nor did they secure the vote to Negroes terrorized by white oppression. And, significantly, in 1950 the Court declined to review its own insidious creation, the separate-but-equal doctrine, when requested to do so in a case involving the right of a Negro student to attend the University of Texas Law School.

LONG before the Court undertook any serious review of its constitutional doctrines in the field of race relations, other American institutions were re-evaluating their stands. During World War II and shortly thereafter, various agencies created machinery to make it appear that racial equality had become a part of our public policy. Thus, Presidential executive orders forbade racial discrimination by the recipients of Government contracts, the armed forces ordered the integration of military units and certain states enacted a variety of antidiscrimination laws. The reasons for these faint-hearted shifts in public policy have been discussed by the Advisory Commission and others. The war against Nazi Germany had raised the issue of racism and heightened the expectations of Negroes, who, because of labor shortages, were offered good jobs for the first time. Additionally, policy makers realized that the continuation of America's brand of apartheid could damage our standing with the newly emerging nations. Most important, black Americans came out of the war determined to fight for their rights at home.

Seen in the light of these pre-1954 shifts in attitude, the school-desegregation case did little more than bring the Court up to date. Until the 1954 decision, the gains won by Negroes were more in the nature of favors to be dispensed or withdrawn at the pleasure of the white overlords. Being gifts, not rights, these pre-1954 "reforms" stood as paper testaments only. Segregated Army units still fought in Korea; Negroes were still condemned to unequal job opportunities in defense plants and were openly segregated in the public schools of Northern states which had antisegregation laws.

In 1954, the Court was in a posi-

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LEWIS M. STEEL is associate counsel of the National Association for the Advancement of Colored People.

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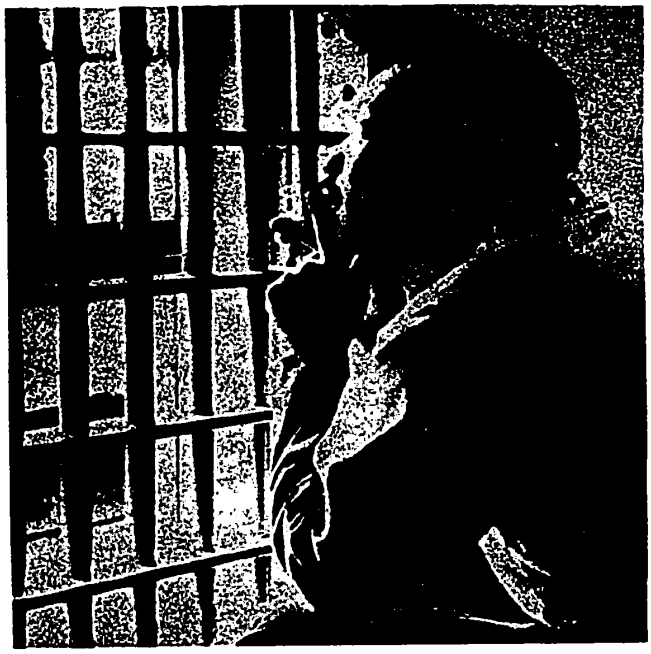
tion to serve notice on the American people that equality was an absolute right of all citizens, that this right came before all other rights and that its further subversion could not be tolerated. By taking this stance, the Court could not only have gone a long way toward relieving its conscience but it could also have established itself as a true constitutional court, dedicated to an impartial search for just principles, irrespective of race.

Instead, the Court chose to act in the manner of the practical political reformer. Rather than ordering sweeping desegregation, it ordered another hearing. A year later, the Court ruled that the South did not have to desegregate its schools immediately, it merely had to do so "with all deliberate speed." Never in the history of the Supreme Court had the implementation of a constitutional right been so delayed or the creation of it put in such vague terms. The Court thereby made clear that it was a white court which would protect the interests of white America in the maintenance of stable institutions.

In essence, the Court considered the potential damage to white Americans resulting from the diminution of privilege as more critical than continued damage to the underprivileged. The Court found that public reasons—the offense to white sensibilities—existed to justify the delay in school desegregation. Worse still, it gave the primary responsibility for achieving educational equality to those who had established the segregated institutions.

THIS decision to delay integration and ignore racially discriminatory mechanisms was more shameful than the Court's 19th-century monuments to apartheid. For, by the mid-20th century, there was no basis on which the Court's nine educated men could justify a segregated society. Scientific racism had been discredited and America had been exposed to the full implications of racism in Nazi Germany.

Moreover, the United States had proclaimed itself the guarantor of freedom by taking up the sword against international Communism. From a judicial standpoint, crimes against humanity had been defined and punished at Nuremberg. American justices had shown themselves to be capable of harshness when judging another people guilty of ghettoizing and destroying an ethnic group. Their failure to take an equally strong position when reviewing the sins of their own countrymen — whose institutions, according to the Court itself, damaged "the hearts and



IN BIRMINGHAM JAIL—Martin Luther King in county jail in Birmingham in 1967. The Supreme Court, the author says, allowed his imprisonment under an "obviously unconstitutional" injunction.

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minds" of Negro children "in a way unlikely ever to be undone"—will long remain as a blot on the record of American jurisprudence.

Unfortunately, however, the Court's treatment of public-school desegregation was only the beginning of a pattern of conduct. Its handling of subsequent race cases indicates that it remains the Supreme Court of white America.

After its 1955 decision requiring "all deliberate speed," the Court did enter a series of decrees which slowly struck down segregation in public transportation and in public facilities and recreational areas. These decisions, however, were directed only at overt discriminatory practices in the Southern and border states.

IN the field of education, the Court refused to review a series of conservative lower-court decisions which upheld

"Reviews have been so timid that only 15 per cent of Southern black children attend other than totally segregated schools."

what school officials described as accidental segregation in Gary, Ind.; Kansas City, Kan., and Cincinnati. As a result, the schools of the North have become segregated faster than Southern schools have been desegregated. Moreover, in the South and border states, Supreme Court reviews of lower-court decisions have been so timid that only 15 per cent of all Southern black children attend other than totally segregated schools. True, the Supreme Court ordered last May that discrimination be eliminated "root and branch" from school systems. But this decision, coming 14 years after *Brown v. Board of Education* in 1954, will yield small dividends unless the Court also agrees to tackle the question of *de facto* segregation. And nothing the Court has done to date indicates that this step is on the agenda.

The Court has also reflected the views of the white community in first protecting Negro protest marches, then removing its protection after significant changes had taken place in American attitudes. When Negroes and their white supporters began demonstrating, they were considered to be humble supplicants seeking succor from white America. Toward the middle of the nineteen-sixties, civil rights demonstrators, rather than playing a humble role, proclaimed that they would not be moved. Negroes had become assertive in a society which considered such behavior anathema, and repression became the order of the day. White America, without any basis in fact, decided that demonstrations and riots were synonymous.

The Court's change in attitude was foreshadowed in *Cox v. Louisiana* in 1965, in which it reversed the convictions of Negro demonstrators but warned that the right to protest could be limited. The new approach was not based on a fundamental difference between recent demonstrations and earlier ones; nothing had occurred which would indicate that civil rights advocates had abandoned their philosophy of peaceful protest. The new restrictions against demonstrations were first applied in *Adderley v. Florida* in 1966. The Court held that, although there was no violence, a peaceful protest outside a police station could be curtailed. The inconsistency between this and earlier cases can be explained only in terms of a judicial concession to white anxieties.

SIGNIFICANTLY, the Court's new approach was reflected in decrees detrimental to the moderate civil rights organizations it originally protected. Thus, the Court, which had earlier intervened to save the National Association for the Advancement of Colored People in Alabama, allowed the Georgia state courts to threaten the group's existence by awarding a huge money judgment against it in a suit seeking damages for picketing. In failing to sustain the N.A.A.C.P., the Supreme Court allowed the state courts to apply completely arbitrary rules of law. Even in the darkest days of antilabor judicial decrees, the unions were never dealt with more harshly.

As public opinion in opposition to civil rights demonstrations mounted, the Supreme Court's position further hardened. In 1967, it allowed an obviously unconstitutional Alabama state-court injunction to serve as a vehicle for

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the jailing of the Rev. Martin Luther King.

This spring, in an even more damaging decision, the Court ruled in *Cameron v. Johnson* that a Federal court was correct in refusing to interfere with the prosecution of Mississippi civil rights demonstrators accused of nothing more evil than maintaining an orderly picket line.

These decisional changes were achieved by an extremely simple expedient. The majority of the Supreme Court justices began to accept the protestations of good faith made by racist public officials, where only a few years earlier the majority had evinced a willingness to look beyond self-serving statements to ascertain the facts. Indeed, the Court has had dissenters who have vainly and loudly protested the majority's new anti-Negro attitude in the realization that such decisions mean a surrender to racists.

As the Court began to rule against Negroes seeking to reverse state convictions, it also decided that civil rights advocates could not seek relief from oppressive state prosecutions by removing their cases to the Federal courts; the justices were willing to assume the impartiality of courts which were strongholds of segregationists. By narrowing Federal jurisdiction, the Court achieved substantially the same effect as its predecessors did when they decided in the 19th century that laws intended to protect Negroes were unconstitutional.

Similarly, after developing rules that Negroes could not be excluded from juries, the Court negated much of its progress. In *Swain v. Alabama*, it upheld the right of Southern prosecutors to challenge and remove all Negroes while selecting a jury. The Court overlooked the fact that a Negro had never sat on a civil or criminal jury in the county in question and accepted at face value the prosecutor's declaration that he would allow Negroes to serve under certain circumstances.

SUPPORTERS of the Court's civil rights record can point only to the field of housing when seeking a pattern of pro-civil rights decisions, and the pattern fades when viewed critically. Since it struck down the judicial enforcement of restrictive covenants in land deeds in 1947, the Supreme Court has ruled favorably in California's Proposition 14 case and has upheld an 1866 law as a general prohibition against housing discrimination based upon race. The Proposition 14 case, decided in 1967, involved an amendment to the California

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Constitution which would have prohibited all state and local fair-housing laws and ordinances. The Court ruled this amendment unconstitutional. When, in the spring of this year, the Court upheld the 1866 law, it gave Negroes the right to sue individuals who refused to sell or rent property to them because of their race. Significantly, this ruling came after Congress had passed a fair-housing act. Once again, therefore, the Supreme Court, contrary to popular belief, was not the ground-breaker in racial reform. Moreover, neither the Proposition 14 case nor the endorsement of the 1866 law will significantly weaken ghetto walls. Most black Americans, having low incomes, will not be able to utilize these rulings, just as they were not able to profit much from the 1947 restrictive-covenant decision.

IN 1967, the Supreme Court could have played a significant role in attacking ghetto housing. The case before it was *Green Street Association v. Daley*. The petitioners, Negro residents and a neighborhood association, complained that public officials in Chicago were using urban-renewal funds to create "a no-Negro buffer zone" around a white shopping center. In essence, the complaint alleged that the urban-renewal program, financed with public funds, was actually a program for Negro removal. The petitioners also said that the city was relocating Negroes only in ghetto areas, thus perpetuating housing segregation.

The complaint was dismissed by a Federal district court in Chicago and the decision affirmed by the circuit court. The Supreme Court, which could have ruled that these facts, if proved, would entitle the petitioners to relief under the 14th Amendment, declined to review the case. Again this year, when Negroes charged that highway construction in Nashville was being used to discriminate against the black community, the Supreme Court declined to review adverse lower-court decisions.

Favorable action in either of these cases would have done far more to aid the ordinary black man than all the other housing cases put together. For today, the effect of Government — local, state and Federal — on housing is far greater than that of individuals.

Those in the legal profession who defend the Court's record do so on the ground that the traditional relationship between the states and the Federal Government

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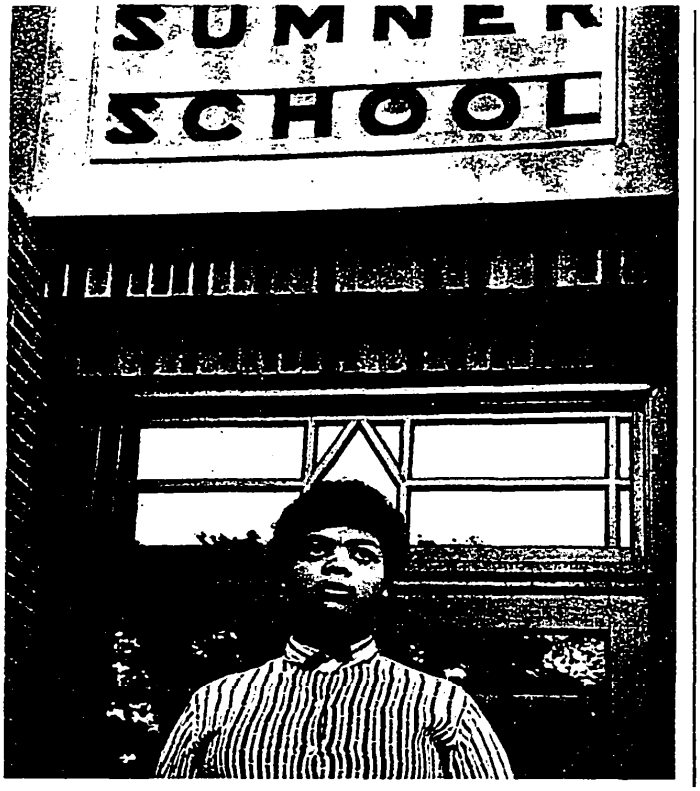

IN AN INTEGRATED SCHOOL—Linda Brown, who started it all in 1954 by winning the right to attend the Sumner School in Topeka, Kan. Her case, the author says, did no more than bring the Court up to date.

must be preserved. According to this theory, the liberties of all Americans are better preserved if the Federal Government is strictly limited in its right to oversee the affairs of the states; the restrictions, the theory says, prevent the creation of a monolithic centralized police state. According to these thinkers, an "activist" Supreme Court would be reliant on Federal power to enforce its writ in the states, thereby tipping an already precarious balance.

But what is this argument really worth? If basic civil rights can be denied on a systematic basis to any definable segment of the population, that segment is living in a police state. The justification of the Court's record presumes that constitutionally guaranteed freedoms should be analyzed from the point of view of the white American majority.

In effect, the argument is based on the premise that any threat, real or imagined, to the civil liberties of whites should be forestalled, even at the price of denying to black men the rights which may be hypothetically threatened by Federal intervention. For example, whites are afraid that *their* public school systems would be damaged by integration because black children attending segregated black schools perform at a lower academic level. Though the lower performance by Negroes has been brought about by the white community's treatment of Negroes as inferiors, integration has been delayed to save the white public schools at the further expense of black children.

Another argument in favor of judicial nonintervention is based upon the premise that in a democracy the people, through their legislatures, have the primary responsibility to redress grievances. This belief is also comforting only to the majority that completely controls the legislative process.

THE fact is that the fabric of our country is threatened, not by theoretical considerations on the Federal-state relationship, but by the pervasive racism found by the Advisory Commission. "States' rights" is a phrase invented by the advocates of the status quo to stand as a philosophical bar to change. That politicians should grasp such a doctrine is to be expected; after all, politicians like to be able to tell their constituents that local probems are the result of outside interference. But Supreme Court justices should have no constituency; they are appointed for life to sit as judges over all the people.

In fields other than race relations, the Court has, to a much greater extent, acted without regard for popular opinion. Consider, for ex-

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ample, Supreme Court rulings in the fields of reapportionment, separation of church from state, obscenity, criminal law and the protection of Communists or others with unpopular political beliefs. In these areas, the Court has taken an active role in bringing about needed reforms. By and large, decisions in these fields have not been based upon a compromise between constitutional concepts and society's desire to preserve established institutions.

THE reapportionment decisions show the differences in the handling of racial and nonracial cases. In cases involving only the one-man, one-vote principle applied to a political entity, the Court was not interested in the reasoning behind a challenged apportionment plan. It was enough that the power of some voters at the polls was diminished. But when Negroes began to challenge the use of gerrymandered districts or at-large elections to reduce the power of their votes, the Supreme Court backed away. For Negroes, it soon became clear, proof of the dilution of their votes was not sufficient; they also had to prove the subjective intent of legislators to limit their voting power.

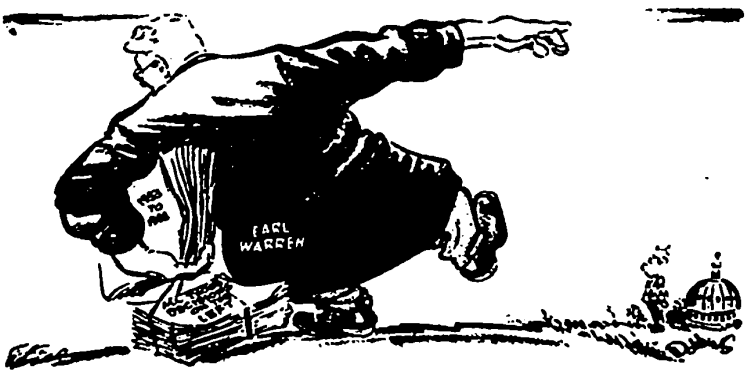
A review of decisions affecting religion, obscenity and political belief also illustrates the differences between racial and nonracial cases. In first ruling that public-school authorities could not require the recitation of prayers in school and then broadening the scope of this ruling, the Court ignored massive outcries that it was ordaining a godless society. The pious—and America is a church-going country—were equally upset by a rash of decisions which effectively throttled the censor's authority to control what we read and see. Nor did the Court heed pleas that the necessity for the maintenance of law and order required the electronic invasion of homes and the use of confessions obtained before an accused could consult with a lawyer. Red-baiting was equally ineffective when the Court was faced with statutes and administrative fiats ostensibly designed to protect the United States against internal subversion. Supreme Court decisions in these fields demonstrate that public opinion need not influence the judicial interpretation of constitutional rights.

The Court has not been so bold in race relations. Since the Civil War, it has allowed itself to be swayed by the prejudices and mores of whites and, more recently, by their fears that equality for Negroes would adversely affect them. In the 19th century, an activist Supreme Court helped the Southern states defeat Congress's plan to rid this country of all the remnants of slavery. In recent years, a cautious Supreme Court has waltzed in time to the music of the white majority—one step forward, one step backward and sidestep, sidestep.

Each justice obviously has some effect on the direction of the Court's dance, so the power struggle over the appointment of a new Chief Justice cannot be entirely dismissed. However, the pattern of decisions in the field of civil rights indicates that it is not the thinking of individual justices, but the philosophy of the entire Court on civil rights that must be reoriented if the Court is to move out of the shadow of the 19th century.

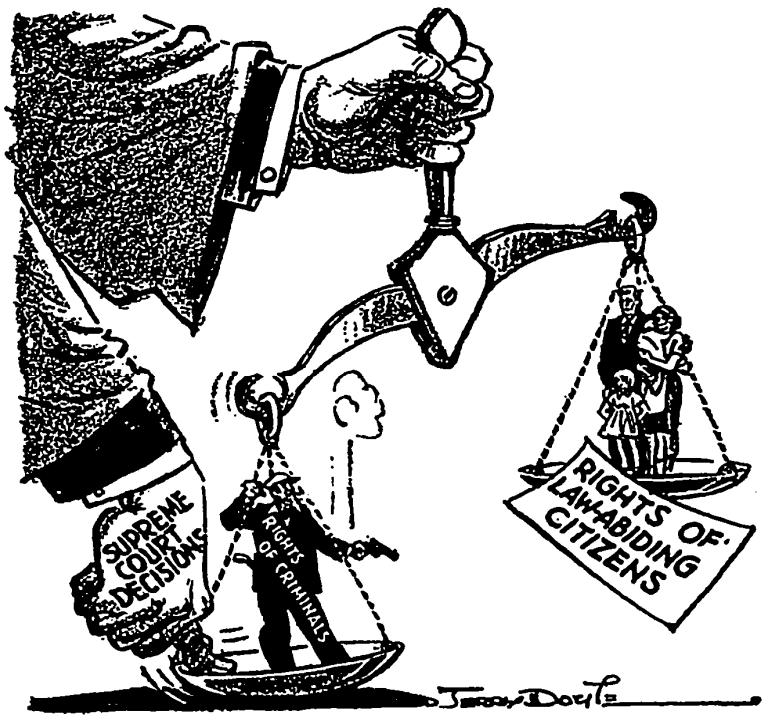
Racial equality, of course, is dependent upon more than just Court decisions. Severe readjustments in political power and a redistribution of wealth must take place in order to avert catastrophic racial conflict. When the forces of reform are reduced to fighting for one judicial appointment to a Court that has inadequately interpreted the constitutional mandate of equality, it is evident that the advocates of the status quo are achieving their purpose no matter what the outcome of the power struggle. ■

Two Conventional Criticisms



Jim Dobbins in The Boston Herald-Traveler.

"Der Goes th' Jedge! Der Goes th' Jedge!"



Jerry Doyle in The Philadelphia Daily News.

"Too Much Judicial Pressure on the Scales of Justice"

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